



December 9, 2022

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Re: Notice of Proposed Rulemaking (NPRM) - Standard for Determining Joint Employer Status, Docket No. NLRB-2022-0001, RIN 3142-AA21

Dear Ms. Rothschild:

On behalf of the National Demolition Association (NDA), we respectfully submit the following comments regarding the National Labor Relations Board (NLRB) Noticed of Proposed Rulemaking on the Standard for Determining Joint Employer Status published in the Federal Register on September 7, 2022.

NDA represents nearly 500 U.S. and Canadian companies that offer standard demolition services as well as a full range of demolition-related services and products. NDA educates members on the latest advances in equipment and services, provides educational programs and tools to stay abreast of regulatory and safety matters and keeps regulators informed about issues in our industry. NDA also increases public awareness of the economic and societal benefits of demolition.

According to information published in the Federal Register, the NLRB is proposing to rescind and replace the final rule entitled “Joint Employer Status Under the National Labor Relations Act,” which was took effect on April 27, 2020. The proposed rule would revise the standard for determining whether two employers, as defined in section 2(2) of the National Labor Relations Act (NLRA or Act), are joint employers of particular employees within the meaning of section 2(3) of the Act. The proposed changes are designed to explicitly ground the joint employer standard in established common-law agency principles and provide relevant guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment.¹

When determining the status of joint employers, NDA opposes the expansion of the traditional test in which a company must exercise direct and immediate control over an employment relationship to be considered a joint employer. To this end, NDA has significant concerns regarding the NLRB's proposed rule to redefine the joint employer relationship and its potential impact on demolition contractors and small businesses. NDA believes the proposed rule is overly broad, inordinately complex, and will impose onerous compliance costs on employers, particularly for contractors in the construction industry.

¹ 87 FR 54641

Under the proposed rule, the NLRB would consider evidence of reserved and indirect control over employees' essential terms and conditions of employment when analyzing and determining joint employer status.² In addition, the proposed rule would expand the definition of “essential terms and conditions of employment” to include wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.

When applying this expanded definition to a construction site, the Board could determine that a general contractor (GC) is a joint employer with its subcontractor(s), even if the GC does not have direct control of all the terms of employment for the employees of the subcontractor(s). In effect, this proposed rule could make general contractors liable for every subcontractor on a construction site. The uncertainty and confusion resulting from this expanded definition could have detrimental consequences for the construction industry, such as increased compliance and administrative costs for employers, along with stifled economic growth and job creation. Further, the proposed rule could harm small demolition contractors by discouraging larger employers from pursuing subcontracting opportunities with smaller employers due to concerns over liability.

Instead of making the nature of joint employer status more complex for employers and employees, the NLRB should establish a clear and concise standard which mirrors the Department of Labor’s (DOL) final rule promulgated in 2020.³ This rule provided much needed clarity to the joint employer relationship by creating a four-factor test to determine joint employer status.⁴ NDA supported the DOL’s 2020 rule as it was based on well-established precedent and provided uniformity and consistency to a previously abstruse standard. NDA urges the Administration to draft a final rule which is narrow in scope and provides certainty for demolition contractors.

Thank you for the opportunity to provide comment on this issue. For any questions, please contact NDA’s Senior Legislative and Regulatory Coordinator Alex McIntyre at amcintyre@demolitionassociation.com.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Lambert", written in a cursive style.

Jeff Lambert
Chief Executive Officer
National Demolition Association (NDA)

² Ibid.

³ 85 FR 2820

⁴ Ibid.